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IN THE

# Supreme Court of the United States

TOWN OF ISLIP, THOMAS ISLES, AS COMMISSIONER OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT AND CARL P. MALTESE, AS DIVISION DIRECTOR OF THE DIVISION OF BUILDING OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT, AND AS TOWN OF ISLIP DIRECTOR OF BUILDING AND HOUSING, PETITIONERS

*v.*

HOWARD NORTON

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF

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**REPLY BRIEF FOR PETITIONERS**

In opposing the Town's petition, the respondent acknowledges what is at stake here – namely, the "federalization" of local zoning disputes, but argues that is not a compelling enough reason to interest this Court:

> the Town argues that "This Court's intervention is required to avoid the "federalization" of local zoning disputes" (Petition, at 8). That rationale, even if applicable, would not be a sufficiently compelling reason to grant certiorari under the circumstances of this case.

Brief in Opposition to Petition at 3. We disagree.

1. The unprecedented "federalization" of local zoning disputes is certworthy. While this Court has not yet spoken, it cannot be gainsaid there is an ever-increasing willingness of landowners to convert ordinary land use disputes into a "federal" case, typically under the guise or rubric of a Section 1983 action (42 U.S.C. §1983). *See, e.g., Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 597 (3d Cir. 1998) (stressing "the importance of the finality requirement and our reluctance to allow the courts to become super land-use boards of appeals"); *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986) ("federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many legislative and administrative agencies"); *Celentano v. City of West Haven*, 815 F. Supp. 561 (D.Conn 1993) ("[t]o exempt

[plaintiff]'s claim from the *Williamson* final decision requirement . . . would permit a disgruntled landowner to by-pass or preempt the local agency charged with adjudicating the validity of zoning designations in favor of a federal district court"); *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1118 (E.D.Pa. 1993) ("[plaintiff] should not be able to circumvent the well-established procedures for challenging the validity of a zoning ordinance by instead using a federal lawsuit").

Just last week, the New York Court of Appeals lamented that state courts – to no lesser or greater degree than federal courts – should be hesitant to allow local land use disputes to be transformed and prosecuted as constitutional claims under the guise of Section 1983. *Bower Associates v. Town of Pleasant Valley*, — N.Y.2d —, — N.Y.S.2d —, 2004 WL 1064237 (May 13, 2004) ("'42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations' [internal citation omitted]. In the same vein, federal courts dismissing section 1983 land-use claims have repeatedly noted that they do not function as zoning boards of appeal, or substitute for state courts interpreting land-use regulations"). The grant of certiorari in this case will permit this Court to stem this tide in the federal courts, and to insist on strict adherence to *ripeness* and other prerequisites to the assertion of land use-based Section 1983 claims in the federal courts. This is particularly compelling in the area of local zoning laws, which epitomize the need for such disputes to be resolved within the province of state and local governmental bodies and, if necessary, through available state court remedies – not in the federal courts.

In the case at bar, the Town was summarily adjudged to have violated the plaintiff-landowner's *procedural due process* rights, even though by all accounts the plaintiff failed – and still refuses to this very day – to avail himself of available administrative and state court remedies to redress any alleged loss or deprivation of his *legal, non-conforming use*, the very nature of which is in direct contravention of the Town's current zoning laws. (Hence, the term *legal, nonconforming use.*) The summary judgment ruling in this case sweeps aside, and is a virtual affront to, important *ripenes* and *due process* hurdles rooted in the very Due Process Clause (U.S. CONST. AMEND., XIV, § 1) itself.[1] This is all the more troubling where, as here, the entire Due Process violation supposedly occurred here because a local Town Building Official made a simple and ordinary notation on the plaintiff's certificate of occupancy (C/O), the import and effectiveness of which was – and still is – subject to further consideration and available remedies before the Town's local Zoning Board of Appeals (ZBA) as well as before the state courts. Plaintiff simply and inexcusably chooses not to pursue those remedies. *See* Petition at 3-6, 18-20.

2. The failure of plaintiff's due process claims to pass muster under *ripeness* or *finality* grounds is manifest here. Notably, the lower courts (*see* n. 1 *supra*) inexplicably held that plaintiff's

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[1] The Petition further explains why the cursory and summary nature of the second circuit's affirmance in this action neither prohibits, nor should deter, this Court's ultimate decision whether or not to grant certiorari in this case. *See* Petition at 10.

*procedural* due process claim was ripe, even though his *substantive* due process claim was not ripe. But that strained conclusion cannot be justified based on either the substantive laws, or the material facts, relevant to the outcome of this Section 1983 action. *See* Petition at 18-20.

This Court has recognized that "[t]he ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026 (2003)(internal citation omitted). Moreover, the existence of a ripe controversy is so important that courts "cannot [even] rely upon concessions of the parties and must determine [for themselves] whether the issues are ripe." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). This Court's adherence to, and insistence upon, the requirement of a *ripe* and *final* controversy in relation to land use-based Section 1983 lawsuits is a necessary and effective means of stemming, or at least exercising a degree of control over, the ever-rising tide of such cases.

Here, by all accounts, including the respondent's own Statement of the Case, an application to the Town's ZBA was (and still is) available to respondent concerning the very issue raised in his civil rights lawsuit – namely, whether his property continues to enjoy a *legal, nonconforming use*, despite the apparent loss or termination of such use by reason of an intervening fire and abandonment of such use, and despite the Town's so-called "revoking notation" made to the plaintiff's C/O. Likewise, by all accounts,

respondent was specifically and repeatedly advised by the Town of the availability of a ZBA petition (Joint Appendix 354-355; 377; 463-467). Further, even if the respondent's ZBA petition were denied, the respondent could have then availed himself of yet further available state court remedies under N.Y. Civ. Prac. L. & R. Art. 78. *See* Petition at 21.

To be sure, there is a seeming conflict between the rule that civil rights actions do not require exhaustion of administrative remedies (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982)), and the concern that federal courts should not become embroiled in the myriad proceedings and disputes inherent in local zoning matters, so as to avoid the transformation of the federal courts into "super zoning boards of appeals". This too is worthy of the Court's attention. The conflict is reconcilable by nothing less than strict adherence to ripeness and finality. This Court stated as much in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985). Significantly, while *Williamson* was decided in the Fifth Amendment Takings context, this Court's holding and analysis in *Williamson* that an available, non-appellate original petition to a ZBA renders a claim non-final (*id.*) should be applied with equal vigor to land-use based Section 1983 claims purportedly arising under the Due Process Clause.

3. There is no merit to the respondent's hollow contention, made in passing in its Brief in Opposition to the Town's Petition (*see* Br. in Opp. to Pet. at 12), that petitioners failed before the second circuit to "raise (and therefore abandoned)" the

assertion that the ZBA had (and still has) original, non-appellate jurisdiction over *legal, nonconforming use* rights. Petitioners specifically raised as Point I of their Appellant's Brief before the circuit court that plaintiff's due process claims are not ripe or final because "a truly 'final' and 'full' determination [had not] been sought through a simple application to the ZBA" (Appellant's Br. in 2d Cir. at 17). Moreover, when plaintiff urged on appeal in the second circuit that the "Zoning Board of Appeals" by name possesses only appellate jurisdiction, the Town responded to and directly dispelled that erroneous contention. The Town indeed responded in its Reply Brief before the second circuit that under controlling New York Town Law, the ZBA has *original jurisdiction* over, *inter alia*, legal, nonconforming use rights and determinations affecting its local citizens, including over the plaintiff's dispute in this case (Appellant's Reply Br. in 2d Cir. at 9-11[2]).

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[2] The Town argued (emphasis in original):

> under N.Y. Town Law, the Islip ZBA's jurisdiction is *not* limited to deferential review of an administrative official's finding. N.Y. Town Law specifically provides that the ZBA is the ultimate decisionmaker and that when it renders a decision it is as if the administrative official had rendered the decision. *See* N.Y. Town Law 267-b (the ZBA shall make determinations "*as in its opinion ought to have been made ... and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken*").
>
> Additionally, as the Practice Commentary to the Town Law explains with respect to special permits, but which is equally applicable to nonconforming uses, in such circumstances the

4. Further, in a virtual affront to *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), which embodies a *strict entitlement test*, the lower courts entirely dispensed with the requirement that the plaintiff-landowner must *affirmatively prove* his entitlement to a legal, nonconforming use as the *sine qua non* of an actual constitutional violation. Instead, the lower courts permitted the plaintiff to simply rest on a bare *presumption*,[3] coupled with plaintiff's unprecedented and prejudicial assertion of the Fifth Amendment privilege against self-incrimination (U.S. CONST., AMEND. V) as to the very existence or entitlement to maintain his alleged legal, nonconforming use. Yet that is precisely the anomaly sanctioned by the lower courts in this case.

The insistence that a landowner, at the very least, affirmatively prove that he or she possesses a

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jurisdiction of the ZBA is "*original*" and not "appellate." Rice McKinney's Prac. Comm., N.Y. Town Law 267-a (Suppl. 2003) p. 189; *cf.* Town Law 267-a(13)(b) (empowering the ZBA to enter default judgments "[i]n exercising its appellate jurisdiction only"). The ZBA thus most certainly "participate[s]" in the "decisionmaking." *Williamson, supra.*

[3] As explained in the Petition, the *presumption* did not even properly apply here. Petition at 15-16. Indeed, plaintiff's invocation of the Fifth Amendment was even more incredible given that under controlling principles of state law, and as explicitly indicated on the C/O's themselves, the indication of zoning status such as nonconforming use on a C/O cannot be relied upon for assurance that plaintiff has a vested nonconforming use in perpetuity or until affirmatively "revoked" by the Town. Petition at 15-16.

*vested* or *protectible property right*, is also deserving of this Court's review. This is particularly so where, as here, pre-existing or *nonconforming* use rights are at stake. Emphasized in the Town's Petition, and unanswered by the respondent, is that the very aim of state and local law is to "extinguish" such nonconforming uses over time, since they are by definition *nonconforming* to the Town's current zoning laws. *See* Petition at 12-15. The question of how long such *nonconforming* rights continue, whether they can be constitutionally lost or extinguished over time by virtue of naturally and inevitably occurring events (*i.e.*, the properties will eventually become run-down, unfit for use, the nonconforming use is eventually terminated, or the structure is damaged by fire), and whether the federal constitution imposes a burden upon local governments and municipalities to continually re-canvass all pre-existing structures to detect whether a nonconforming use has terminated as a predicate to a full "pre-deprivation" process, are all matters critically deserving of this Court's attention.[4]

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[4] The Town Code provisions analyzed by the district court are typical of zoning laws, which define a *limited* right to continue a pre-existing use which was rendered nonconforming upon enactment of a zoning law. The Town Code, §68-15 (quoted in the district court's summary judgment decision), indicates that such nonconforming uses can only be continued for so long as they have not been abandoned, a fire has not occurred, or the use changed. The district court's interpretation of this provision, that it does not define a *limited* right to continue a nonconforming use and merely defines what would constitute "just cause" to affirmatively terminate the nonconforming use rights upon a full hearing, was made as a matter of legal construction of the words of the statute, and was not a factual determination. This strained legal interpretation of the statute does not impede in any manner this Court's ability to review this case or the statute, particularly when

The legal status and effect of nonconforming use rights is a particularly timely matter for this Court to review, given that zoning laws did not become widespread in large suburban areas until after World War II,[5] and the structures pre-existing such zoning laws are nearing the end of their useful lives, to the extent that has not occurred already.

5. Respondent's Brief in Opposition to the Petition refers to a criminal proceeding. Petitioners thus hasten to reiterate that this is not a deprivation of a due process "liberty" case. The criminal summons issued to respondent never led to an arrest or custody, and the respondent has specifically withdrawn all claims for monetary damages.

6. Lastly, respondent vainly contends that absent exigent circumstances, pre-deprivation hearings are always required by the Due Process Clause regardless of the property right at stake. Respondent simply ignores, as did the lower courts in this case, this Court's express admonishment in *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931), that "[w]here only

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nothing in the statute refers to "just cause" or anything else implicating an affirmative revokation or termination upon notice or a hearing.

[5] New York City, for example, adopted the first comprehensive zoning code for an entire city in 1916. This Court approved of such land use regulation in *Village of Euclid v. Ambler Realty Co.*, 272 U.S.365, 47 S.Ct. 114 (1926), which gave birth to the Euclidian zoning era. Smaller municipalities, and specifically suburban communities which experienced exponential growth after World War II, enacted comprehensive zoning codes thereafter.

property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." Seventy-three (73) years later, and after the advent and near passage of the Euclidian zoning era, this Court should affirm that the availability of post-deprivation review, particularly in the ever-rising tide of Section 1983 land use cases, readily satisfies the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test which governs all Due Process inquiries. *See, e.g., Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *Nestor Colon Medina v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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